

No. 15323

United States
Court of Appeals
for the Ninth Circuit

FLOYD SMITH,

Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

No. 8421

FLOYD SMITH,

Plaintiff,

vs.

KENNETH BUCK and KENNETH BINDER,

Defendants.

Before the Honorable Gus J. Solomon.

PRE-TRIAL ORDER

Appearances:

Attorneys for Plaintiff:

Reuben Lenske, David Spiegel, Lenske,
Spiegel & Spiegel.

Attorneys for Defendants:

McGuire, Shields, Morrison & Bailey,
William Morrison.

Nature of Proceedings

This is an action by plaintiff to recover damages for injuries to person, which plaintiff claims he sustained by reason of the negligence of defendants; the action arises out of an accident which occurred on October 31, 1955, when the trailer of a truck assembly owned by the defendant, Kenneth Binder, and driven by the defendant, Kenneth Buck, struck the plaintiff.

Agreed Facts

I.

The plaintiff is a resident and citizen of the State of Washington; the defendants are residents of the State of Oregon.

II.

The amount in controversy, being the amount of damages claimed by plaintiff and denied by defendants, exceeds the sum of \$3,000.00 exclusive of injuries and costs.

III.

At all times herein mentioned U. S. Highway 26 was and now is a duly constituted and traveled highway in the State of Oregon, running in a southwesterly and northwesterly direction in Clackamas County and adjacent counties, and that the incident hereinafter described occurred on said highway approximately six miles east of the town of Government Camp, Oregon.

IV.

That on October 31, 1955, plaintiff was outside of his passenger automobile being in the course of putting on chains on the rear wheels of the same and the defendant Kenneth Buck was driving a truck and trailer owned by the defendant, Kenneth Binder, as his agent, in a southwesterly direction on U. S. Highway No. 26.

V.

That at said time and place the trailer attached to said truck struck some portion of the body of

plaintiff and that plaintiff suffered some injuries thereby.

Plaintiff's Contentions

I.

The collision and injury resulting to plaintiff on account thereof were proximately caused by the negligence, carelessness, recklessness and unlawful conduct of defendants in the following respects:

(a) In driving their vehicle at said time and place without chains or other apparatus to prevent the same from skidding or sliding on a roadway made slick by falling and/or packed snow.

(b) In failing to keep a lookout.

(c) In failing to maintain control of said vehicle.

(d) In driving said vehicle at an excessive rate of speed considering the time, place and circumstances.

(e) In attempting to drive said truck and trailer through a space bounded by the plaintiff on one side and pedestrians on the other side, too narrow under such circumstances to permit the safe passage of said vehicle under the circumstances then and there present without contact with one or the other.

(f) In failing to sound his horn or give any warning of his approach.

II.

That as a direct and proximate result of the negligent, careless and reckless conduct of defendants, plaintiff was severely, permanently and painfully injured and suffered general and special damages in the sum of \$50,000.00.

Defendants' Contentions

I.

That defendants or either of them were not guilty of any negligence.

II.

That at the time and place of the collision referred to herein, plaintiff was himself careless, reckless and negligent in the following particulars:

(a) In failing to keep a proper lookout.

(b) In placing himself in a position of danger on the traveled portion of the highway.

(c) In assuming the risk then and there attendant.

III.

That the careless, reckless and negligent acts of plaintiff as hereinabove set forth contributed to and proximately caused the injuries plaintiff sustained.

Issues

1. Were the defendants, or either of them, negligent in any of the particulars contended for by plaintiff?

2. If defendants were negligent, was such negligence, if any, the proximate cause of plaintiff's injuries?

3. Was plaintiff guilty of negligence contributing to the accident and plaintiff's injuries in the particulars contended for by defendants?

4. What injuries did plaintiff sustain?

5. Is Plaintiff entitled to any damages for such injuries?

6. If plaintiff is entitled to damages, what amount of damages should he be allowed?

It Is Hereby Ordered that the foregoing is the Pre-trial Order in the above-entitled cause; that it supersedes the pleadings, which are hereby amended to conform hereto, and that said pre-trial order shall not be amended upon trial except by consent or by order of the Court to prevent manifest injustice.

Dated this 22nd day of May, 1956.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 22, 1956.

In the United States District Court
for the District of Oregon

Civil No. 8421

FLOYD SMITH,

Plaintiff,

vs.

KENNETH BUCK and KENNETH BINDER,

Defendants.

ORDER

This case came on for trial before the Honorable Claude McColloch, Chief Judge of the above-entitled Court, plaintiff appearing in person and by Reuben Lenske, one of his attorneys, defendants appearing by W. H. Morrison and Robert Jones of their attorneys, a jury was duly empanelled and sworn, opening statements were made by counsel, evidence was introduced by plaintiff, and at the close of plaintiff's testimony defendants moved the Court for a dismissal on the ground that upon the facts and the law the plaintiff had shown no right of relief. The Court, having heard arguments of counsel and being fully advised in the premises,

It Is Hereby Ordered that defendants' motion for a judgment of dismissal be and the same is hereby allowed.

/s/ CLAUDE McCOLLOCH,
Judge.

Done in open court this 24th day of May, 1956.

[Endorsed]: Filed May 24, 1956.

[Title of District Court and Cause.]

MOTION

Comes now plaintiff and moves the Court for an Order granting him a new trial in the above-entitled cause and if judgment of dismissal was entered on or about May 22, 1956, that said judgment be set aside. This Motion is based upon error of the Court in discharging the jury empaneled to try said cause and in ordering the said dismissal and in holding adversely to the plaintiff on the issues presented, i.e., on the issue of negligence of the defendants and proximate cause of defendants' trailer striking and injuring plaintiff and on the issue of contributory negligence if the Court's Order of dismissal was based thereon.

/s/ REUBEN LENSKE,
Of Attorneys for Plaintiff.

I hereby certify that on the 31st day of May, 1956, I served the foregoing Motion upon Maguire, Shields, Morrison & Bailey, attorneys for defendants, by then depositing a full, true and correct copy thereof in the United States post office addressed to the said Maguire, Shields, Morrison & Bailey at 723 Pittock Block, Portland, Oregon, and prepaying the postage thereon.

/s/ REUBEN LENSKE,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

ORDER

A motion for a new trial heretofore filed by plaintiff came on for argument on the 13th day of August, 1956, before the Honorable Claude C. McCulloch, Chief Judge of the above-entitled Court, plaintiff appearing by David Spiegel, one of his attorneys, and defendants appearing by W. H. Morrison, one of their attorneys, and after hearing arguments of counsel and being fully advised in the premises,

It is Hereby Ordered and Adjudged that the said motion be and the same is hereby denied.

Dated this 30th day of August, 1956.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Aug. 30, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Kenneth Buck and Kenneth Binder, above-named defendants, and McGuire, Shields, Morrison & Bailey, William Morrison, their attorneys.

Notice is hereby given that the plaintiff herein, Floyd Smith, does hereby appeal the judgment of

dismissal entered herein on or about May 22, 1956, and from the Order denying said plaintiff's motion that said judgment be set aside and for a new trial entered herein August 13, 1956, and the whole of said judgment and order, to the Circuit Court of Appeals, Ninth Circuit, United States Circuit Court of Appeals.

/s/ DAVID M. SPIEGEL,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 11, 1956.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, the above-named defendants, Kenneth Buck and Kenneth Binder, recovered a judgment of dismissal against Floyd Smith, the plaintiff herein in a civil action before the Honorable Claude McColloch, a Judge in and for said Court, said judgment having been rendered on the 22nd day of May, 1956.

And, Whereas, the said Floyd Smith is about to appeal from said judgment to the United States Court of Appeals for the Ninth Circuit, including the costs and disbursements therein.

Now, Therefore, We, Reuben G. Lenske, attorney for appellant, and Frances Slossar of the County of Multnomah, State of Oregon, surety, do hereby jointly and severally undertake and promise, on

the part of the appellant, that said appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal.

[Seal] /s/ REUBEN G. LENSKE,

[Seal] /s/ FRANCES SLOSSAR.

State of Oregon,
County of Multnomah—ss.

Frances Slossar, whose name is subscribed to the within undertaking as surety, being duly sworn, says: That she is a resident and freeholder within the State of Oregon; that she is not a counsellor or attorney at law, sheriff, clerk or other officer of any court, and is worth the sum of Two Hundred Fifty (\$250.00) and no/100 Dollars, over and above all debts and liabilities and exclusive of property exempt from execution.

/s/ FRANCES SLOSSAR.

Subscribed and sworn to before me this 10th day of September, 1956.

[Seal] /s/ R. G. LENSKE,

Notary Public for Oregon.

My Commission Expires: 7-20-57.

[Endorsed]: Filed Sept. 11, 1956.

United States District Court
District of Oregon
No. Civil 8421

FLOYD SMITH,

Plaintiff,

vs.

KENNETH BUCK and KENNETH BINDER,

Defendants.

May 22, 1956.

Before: Honorable Claude McColloch, Chief Judge.

Appearances:

REUBEN G. LENSKE and
DAVID M. SPIEGEL,
Of Attorneys for Plaintiff.

WILLIAM H. MORRISON,
Of Attorneys for Defendants.

TRANSCRIPT OF TESTIMONY

(A jury having been duly and regularly empaneled and sworn, opening statements were made to the jury by counsel for the respective parties, and thereafter the following proceedings were had.)

FLOYD SMITH

the plaintiff herein, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lenske:

Q. What is your full name, Mr. Smith?

A. Floyd Smith.

Q. Where do you reside?

A. Seattle, Washington.

Q. Where were you residing on October 31st, 1955?

A. Seattle, Washington.

Q. Have you been a resident of Seattle ever since then until now?

A. Yes, sir.

Q. Prior to the time that you moved to Seattle, where did you live?

A. Roseburg, Oregon.

Q. For how long did you live in Roseburg?

A. About two years and a half.

Q. What was your occupation on October 31st, 1955?

A. I was a salesman.

Q. For whom?

A. Western Motels & Investments.

Q. By whom are you employed now?

A. The same company. [2*]

Q. Will you tell the jury just what in the line of work you were doing on October 31st, 1955?

A. I was taking Mr. Howard from Seattle, Washington, to Bend, Oregon, for the purpose of

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Floyd Smith.)

negotiating a trade between him and a gentleman there in their motels.

Q. By the way, with whom do you live in Seattle, Washington?

A. My wife and two children.

Q. How old are your children?

A. Twelve and fourteen.

Q. Were you so living in October, 1955?

A. Yes, sir.

Q. Would you please draw out on this blackboard the scene where the accident happened, to the best of your ability?

A. I can try to. I was approximately here. The other car across from me was over in here, and there was two or three other vehicles back in here.

Q. Now, would you indicate the directions there so that the jury will know?

A. This would be traveling east.

Q. Then this is the main highway that goes to Eastern Oregon beyond Government Camp; is that correct?

A. Yes. It would be 26.

Q. Will you make a dot where you were immediately before you were hit?

(The witness marked on the drawing as requested.) [3]

Q. And where Mr. Howard was immediately before he was hit.

(The witness marked on the drawing as requested.)

(Testimony of Floyd Smith.)

Q. Very well.

A. I was closer to the car than that shows.

Mr. Lenske: Did the jury hear that?

A. I was closer to the car than the dot shows.

Q. Very well, Mr. Smith, what kind of an automobile were you driving?

A. Hudson four-door sedan.

Q. What year model? A. 1954.

Q. Tell the jury approximately what time it was that you brought your automobile to rest at that side of the road.

A. Well, approximately 4:00 o'clock.

Q. Four o'clock in the afternoon?

A. P.M., yes.

Q. As of what date?

A. October 31st, 1955.

Q. Now, what were the weather conditions and the road conditions at that time in that area?

A. Well, there was some snow on the road, and it was snowing lightly.

Q. For what reason did you park your car? Why did you stop it or park it?

A. To put my chains on. [4]

Q. What necessity was there for chains at that time and place? A. I lost traction.

Q. Now, where did you park your car with relation to the guardrail? First, let me ask you was there a guardrail along the highway there?

A. Yes, there was.

Q. What kind of a guardrail?

A. Steel; kind of a wide band.

(Testimony of Floyd Smith.)

Q. Was it painted?

A. I think it was painted white.

Q. Where did you stop your car with relation to the guardrail?

A. Oh, I would say it would be approximately in two or three feet of it.

Q. Was there any snow between where you stopped your car and the guardrail?

A. Yes, there was some there. It had been plowed out.

Q. Were you able at that time and place to bring your car any closer to the guardrail than you did?

A. I probably could have, but I wouldn't have had room to have worked on the chain to get it on.

Q. How much space did you leave there so you could put your right chain on your right rear wheel?

A. As I say, it could have been two or three or four feet. I don't recall exactly.

Q. Now, would you have had control of your car if you continued [5] to drive it at that time and place without putting chains on? A. No, sir.

Q. What else happened before the defendant's truck and trailer came and hit you? What was done by other cars? You can describe the situation as it existed at that particular time.

The Court: 'Ten minutes' recess.

(Short recess.)

Mr. Lenske: Will you read the last question?

(Last question read.)

(Testimony of Floyd Smith.)

A. A woman pulled up on the opposite side of the highway going the same direction, almost opposite me. And someone from one of the other cars that was parked down the highway came up to help her put on the chains.

Q. (By Mr. Lenske): Were there any other vehicles parked in that area at that time?

A. Yes.

Q. How many?

A. I don't recall exactly. After it was over with I remember there was three.

Q. Will you tell the jury what you did after you parked your car?

A. I got out and opened the trunk and got the chains out. Mr. Howard placed one behind the right rear wheel and I placed one behind the left rear wheel, and I got a blanket out and laid it on the highway and attempted to put the chain over [6] the left rear wheel. And I heard a roar of a truck, and somebody hollered something at me, and I scrambled to my feet. And as I was doing that some pellets of snow struck me across the back of the legs, and then the truck struck me across the back, throwing me into the car, and passed on.

Q. Did the truck strike you or the trailer?

A. Well, it would be the trailer.

Q. What part of you was hit by the trailer?

A. The lower part of my back.

Q. Against what part of your automobile were you struck?

A. The left rear fender.

Q. What effect did it leave on the left rear

(Testimony of Floyd Smith.)

fender? A. It bent it in.

Q. What part of your body hit the left rear fender of your automobile?

A. My upper left leg from my head down to my knee.

Q. When you were lying down to put the chain on how close to your automobile were you at that time? A. Oh, right up close to it.

Q. When you jumped up, how much distance were you from your automobile?

A. Well, I couldn't say exactly. I was pretty close to it.

Q. Then what happened after that?

A. You mean after I was struck?

Q. Yes. [7]

A. Well, I grabbed my back and looked over to my left in time to see Mr. Howard flying through the air like this and dropping in front of the right rear wheels of the trailer, which passed over him.

Q. Then what happened to the truck and trailer after the trailer struck you and ran over Mr. Howard? A. It stopped.

Q. How far did it go before it stopped?

A. Oh, it could have been 10 or 12 feet.

Q. Then in what position were the truck and trailer immediately after this?

A. Well, the truck would be up in the middle of the road and the trailer was on a slight angle downhill.

Q. Now, immediately before you were struck, how much clear distance was there between where

(Testimony of Floyd Smith.)

you were and between where the automobile of the lady was on the other side of the road at that time?

A. How much distance between my car and the one across?

Q. Yes.

A. Well, I judge it to be somewhere between 30 and 40 feet.

Q. Now, what pain did you suffer immediately after you were struck?

A. Well, severe pain in my back and my left leg and a terrific headache.

Q. Did you go anywhere for treatment at any time after that? [8]

A. I went to Providence Hospital.

Q. Who examined you there?

A. Dr. Marxer.

Q. For how long?

A. Well, just a short time that night.

Q. I mean, how long did his examination of you take at that time?

A. Well, I was there about an hour, I should judge.

Q. Then where did you go after that?

A. I went to the City Center Motel.

Q. Did your pain cease or did it continue?

A. It continued.

Q. Tell the jury whether or not you still have pain resulting from this accident.

A. Yes, I do have.

Q. Where?

(Testimony of Floyd Smith.)

A. In my lower back and left leg, and a little shooting pain down my right leg.

Q. Did you have medical treatment since the original examination by Dr. Marxer?

A. Yes, sir.

Q. By whom?

A. Dr. Grossman and Dr. Cohen and Dr. Dooley, and therapy at Dr. Dooley's office in Seattle.

Q. Two of the doctors are here in Portland and one was in Seattle, Washington? [9]

A. Yes, sir.

Q. What was the condition of your health immediately prior to the time you were struck on October 31st, 1955?

A. Pretty good.

Q. Did you have any back pains of any kind prior to being struck?

A. No, sir.

Q. Did you have any side pains prior to your being struck?

A. No, sir.

Q. Prior to your being struck on October 31st, 1955, did you suffer any pain of any kind when having intercourse with your wife?

A. No, sir.

Q. What has been the fact in that respect since then?

A. Well, I have had severe headaches.

Q. Will you describe to the jury just what kind of headaches?

A. Well, they start back here and spread over the top of my head. It feels like the top of my head was going to come off.

Q. What pains do you suffer now in your leg or back? I mean up to the present time. Has any

(Testimony of Floyd Smith.)

of that pain continued? A. Yes, sir.

Q. After the collision, or after this occurrence on October 31st, 1955, were you able to work immediately after that?

A. I wasn't much good for quite a little while.

Q. Why?

A. Well, because of the severe pain and headaches and after effects [10] of the shock, I suppose.

Mr. Lenske: You may cross-examine.

Cross-Examination

By Mr. Morrison:

Q. Mr. Smith, I understand you estimate the right wheels of your car could have been two, three or four feet from the guardrail; is that correct?

A. Yes, sir.

Q. Have you looked over the scene of the accident at any time when there was no snow on the ground? A. No, sir.

Q. You have not. Your left wheels would be out towards the center of the highway?

A. Yes, sir.

Q. You said that there was a lady who had stopped her car opposite you. Was that before you stopped or after you stopped? A. After.

Q. After you stopped. She was going in the same direction you were going, was she not?

A. Yes, sir.

Q. And she stopped on the left side of the high-

(Testimony of Floyd Smith.)

way off the main traveled portion of the highway, did she not?

A. There was a lot of snow on the highway there, sir. I suppose it would be off of it. [11]

Q. I gathered that from the distance, the estimate of distance, you placed her car away from yours. How far did I understand you to say that her car was away from yours?

A. At that time I estimated between 30 and 40 feet.

A. About 30 to 40 feet. It was practically opposite you with the exception of being a little bit west, was it not? A. Yes, sir.

Q. So then her car, when she brought it to a stop, had to be off the paved portion of the highway, didn't it? That highway is 26 feet wide.

A. Oh, yes.

Q. Then you got down to work on the chain on the left rear wheel; is that correct? A. Yes.

Q. Were you behind it or in front of it?

A. I was beside it.

Q. Did you get on your knees?

A. I was lying on the blanket at one time.

A. At one time you were lying down on the blanket? A. Yes, sir.

Q. While you were working on this wheel, putting chains on this wheel, you heard the roar of a motor approaching, did you not? A. Yes, sir.

Q. And you started to get up and then you were hit; is that it? [12] A. Yes, sir.

Q. I take it you didn't know what hit you then?

(Testimony of Floyd Smith.)

A. Not at that moment; no, sir.

Q. You found out afterwards, but at that time when you were hit you didn't know what had struck you; is that correct? A. That is right.

Q. The drawing that you have made, that is just a rough drawing, is it not? You didn't intend that to be absolutely accurate, did you?

A. No, sir.

Q. Isn't it a fact that as you look that over, weren't you more past the center of that curve?

A. Possibly.

Q. You were following your business at that time of selling motels, were you not? You were specializing in that, were you not?

A. Yes, sir.

Q. And you also owned a store in Seattle and that was being operated by a manager, was it not?

A. Yes, sir.

Q. You were going to Bend; is that correct?

A. Yes, sir.

Q. At the time of this accident. You left from Portland? A. I left from Seattle.

Q. You had left from Seattle and you went through Portland, [13] didn't you?

A. Yes, sir.

Q. Did you drive your car away from the scene of the accident? A. Yes, sir.

Q. Did you drive it to Portland that night?

A. Yes, sir.

Q. And you went there to the hospital and were examined by Dr. Marxer? A. Yes, sir.

(Testimony of Floyd Smith.)

Q. You were in the hospital about an hour, were you not?

A. That could have been; yes, sir.

Q. Then when did you next see a doctor, approximately? A. Oh, probably a week.

Q. Who did you see then?

A. Dr. Grossman.

Q. That is in Seattle? A. In Portland.

Q. Did your lawyers send you to him?

A. Yes, sir.

Q. That was about a week after the accident?

A. I think so.

Q. Approximately how many times have you seen a doctor since this accident?

A. Seen Dr. Grossman? [14]

Q. Approximately how many times have you seen doctors altogether since this accident?

A. Oh, probably eight or nine times.

Mr. Morrison: I think that is all.

Redirect Examination

By Mr. Lenske:

Q. How many of those eight or nine times were for therapy treatments, Mr. Smith?

A. Well, the therapy treatments were besides that.

Q. How many therapy treatments did you take?

A. I think seven.

Q. Seven therapy treatments?

A. I think so.

Q. That was in addition to the eight or nine times you visited the doctors? A. Yes, sir.

(Testimony of Floyd Smith.)

Q. Were the therapy treatments by the doctor himself or by a nurse?

A. No, by a therapist in Seattle in conjunction with Dr. Dooley's office. And he prescribed treatment—exercises for me to take.

Q. Who gave the therapy treatments?

A. I don't recall the woman's name that was in charge.

Q. When was the last therapy treatment you took? A. Oh, perhaps six weeks ago. [15]

Mr. Lenske: That is all.

Recross-Examination

By Mr. Morrison:

Q. One other question I neglected. Did I understand you correctly, Mr. Smith, on your direct examination that you were losing traction; in other words, your wheels were skidding when you came to a stop up there? Is that correct?

A. Yes, sir.

Mr. Morrison: That is all.

Mr. Lenske: That is all.

(Witness excused.) [16]

GARY MOORE

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lenske:

Q. What is your full name?

A. Gary Dillon Moore.

Q. How old are you, Gary? A. Twenty.

Q. Where do you live?

A. Roseburg, Oregon.

Q. What do you do?

A. I am a truck driver.

Q. For whom?

A. Mr. Newton Kirschner.

Q. On October 31st, 1955, what was your occupation? A. Truck driver.

Q. For whom?

A. Deschutes Valley Potato Company.

Q. Are you acquainted with any of the defendants in this case? A. No, sir.

Q. Neither Mr. Binder nor Mr. Buck?

A. No, sir; not personally.

Q. Where were you living on October 31st, 1955?

A. Madras, Oregon. [17]

Q. In the afternoon of that day, what were you doing? A. Driving truck.

Q. What kind of a truck?

A. An International.

Q. What type?

(Testimony of Gary Moore.)

A. Ten-wheel flatbed truck.

Q. How long a truck is the one you were driving?
A. About 35 feet over-all length.

Q. In that afternoon from where to where were you driving?

A. From Portland to Redmond.

Q. At that time did your truck have a cargo of any kind?
A. Part of a load.

Q. It was partly loaded?
A. Partly.

Q. What color was your truck?
A. Red.

Q. Did you approach this curve approximately six miles east of Government Camp that afternoon?

A. I did.

Q. Tell the jury what the weather conditions were as you were approaching that curve.

A. It was snowing, and the roads were slick, the sky overcast and the visibility not too good.

Q. Then as you were approaching that curve, did you see anything unusual? [18]

A. Mr. Smith's car was—his wheels were spinning. Other than that nothing unusual, no.

Q. Did you see Mr. Smith stop his car?

A. Yes.

Q. On which side of the road did he bring his car to a stop?
A. On the right-hand side.

Q. Approximately how close to the guardrail? There was a guardrail there, was there not?

A. Yes.

Q. Approximately how close to the guardrail did he stop his car?

A. Oh, between three and four feet, I would say.

(Testimony of Gary Moore.)

Q. Then what did you observe?

A. I seen there was a woman stuck on the left-hand side of the road facing the wrong direction, going the same direction we were going, on the wrong side of the road. She was stuck.

Q. Her car was stopped on the left-hand side of the road?

A. Yes.

Q. How much distance was there between Mr. Smith's car and this lady's car?

A. I would say approximately 25 or 30 feet.

Q. What did you do with your truck at that time?

A. I stopped behind Mr. Smith.

Q. Why did you stop your truck?

A. I was real close to Mr. Smith, and I had a loose tire chain. I was about ready to lose one tire chain on the right-hand side [19] of my truck, and I stopped to take it up, and I didn't think that I should try to go on through there.

Q. I didn't hear the last part.

A. And I didn't think I should try to go on through there.

Q. Why didn't you think you should try to go through there?

A. Oh, it was just close—there was people on both sides of the road. The road was slick. I haven't been a driver too awfully long. I just decided I should stop.

Q. Did you park your truck then?

A. Yes.

Q. Where did you park it?

A. About 15 feet in back of Mr. Smith's.

(Testimony of Gary Moore.)

Q. How far from where Mr. Smith's car was parked could one see Mr. Smith's car while going in the same direction at that particular time and place?

A. Well, I would say 150 or 200 yards, approximately, if they could see him around my truck.

Q. Now, how about the left-hand side of the road? What distance could one see people or cars parked on the left-hand side of the road at that time?

A. Approximately the same.

Q. Did anyone else stop their automobile besides yourself?

A. Yes, there was two or three vehicles behind me.

Q. Immediately after you parked?

A. Yes. [20]

Q. Then when you got out of your truck, what did you do?

A. I walked to the left-hand side of the road and began to assist the lady put on her tire chains, the one that was stuck on the wrong side of the road.

Q. While you were so doing, what did you observe?

A. I saw a truck and trailer, a red one, coming from the east going towards Portland, coming down the hill, and about the same time I could see this fellow's tanker coming up the hill, the yellow truck coming up the hill.

Q. So what did you do?

(Testimony of Gary Moore.)

A. I signaled for the red truck coming down the hill to stop.

Q. By the red truck you mean a truck and tanker that was coming west? A. Yes.

Q. At what rate of speed was that truck coming?

A. He was traveling very slow. I don't know what speed it would be.

Q. At what rate of speed was the defendant's truck and trailer going? Was that going at a different rate of speed than the one that was coming?

A. I would say so, a little bit, yes.

Q. At approximately what rate of speed would you say?

A. Oh, 20 miles an hour; maybe 25.

Q. Just what did you do when you saw those two trucks coming, one from one way and one from the other way? [21]

A. I signaled the red truck to stop.

Q. How did you signal it to stop?

A. I just held up my hand.

Q. What else did you do?

A. I signaled for the other one. The other one had stopped.

Q. How did you do that?

A. By waving my hand at him.

Q. Then what happened?

A. I turned and started to help the lady put her chains on again, went back to the job of doing that. That is when Mr. Howard was hit.

Q. You said something happened. What was that? I didn't hear.

(Testimony of Gary Moore.)

A. That is when the accident occurred then.

Q. What occurred?

A. Mr. Smith and Mr. Howard's car was hit by the truck.

Q. Did the truck pass through between the two automobiles and between the people, Mr. Binder's or the defendant's truck? Did the truck itself pass through?

A. Yes.

Q. What happened to the trailer?

A. It appeared to me that the trailer slid, or perhaps the back end of the truck slid, and the trailer hit Mr. Smith's car and it appeared to me hit Mr. Smith and Mr. Howard.

Q. Mr. Moore, were you subpoenaed to come here?

A. Yes. [22]

Q. By whom?

A. American Associated Insurance Company.

Q. I didn't mean that.

Mr. Morrison: I would like to present a question of law to the Court.

The Court: A little later on.

Q. (By Mr. Lenske): Which party, the defendant or the plaintiff, subpoenaed you?

A. I don't know. A lawyer in Roseburg came where I was working and handed me a subpoena and told me to appear here today. He was a local lawyer. I don't know which side he was with.

Q. How did Mr. Smith or anyone on his behalf ascertain who you were as the person who had been driving that particular truck at that time?

A. How did they find me?

(Testimony of Gary Moore.)

Q. Yes.

A. There was an ad in the paper, first in the Bend Bulletin, and then I believe there was one in The Oregonian. I didn't see it myself, but one of the fellows that worked where I did seen it and told me about it. I called Portland, and my next trip in I stopped in and seen this party.

Q. Who was it that you called, or who was it that put the ad in?

A. Spiegel, Spiegel & Lenske.

Mr. Lenske: You may cross-examine. [23]

Cross-Examination

By Mr. Morrison:

Q. You were subpoenaed by a lawyer in Roseburg to come here, weren't you? A. Yes, sir.

Q. And you were subpoenaed to come in here and give testimony for the defendant?

A. Yes, sir.

Q. You were in my office this morning, weren't you? A. Yes, sir.

Q. And I asked you this morning whom you were subpoenaed by and you told me you were subpoenaed by a lawyer in Roseburg, did you not?

A. Yes, sir.

Q. You also told me you were not subpoenaed by the other side? A. No, sir.

Q. Now, isn't it a fact, Mr. Moore, at the scene of this accident that you signaled the red tanker to stop, the one coming towards Portland. That is

(Testimony of Gary Moore.)

correct, isn't it? A. Yes, sir.

Q. And he pulled over and stopped on the right shoulder of the road; isn't that a fact?

A. Yes, sir.

Q. Now, isn't it also a fact that you then turned and signaled this Mr. Buck to go through? [24]

A. I didn't signal Mr. Buck to go through.

Q. Didn't you tell me this morning in my office that you did? A. No.

Q. Do you remember talking to an attorney, Mr. Charles Marsh from Bend, on the 3rd of November? Do you remember giving him a written statement?

A. I gave a written statement at Redmond.

Q. Yes, to Attorney Charles Marsh of Bend?

A. I believe that was his name.

Mr. Morrison: I would like to have that marked and handed to him.

(The statement referred to was thereupon marked Defendants' Exhibit 1 for identification.)

Q. (By Mr. Morrison): Would you look at the last page and see if that is your signature?

A. Yes.

Q. Now would you read that, please. Would you read that statement to yourself. You don't have to read it out loud. Just glance at that statement, and I will ask you to state whether or not you didn't tell him that you waved that other truck through

(Testimony of Gary Moore.)

and you thought there was plenty of room; otherwise you wouldn't have waved him through?

Mr. Lenske: May it please the Court, I object to the question until such time as counsel wants to introduce it so I can get an opportunity to examine it. [25]

The Court: Objection overruled.

Mr. Morrison: I can probably help you by finding that portion of it a little quicker, if the bailiff will hand it to me.

Q. Read Page 3. Didn't you initial each page of that? Look down and see on each page of that whether or not you didn't put your initials on each page of that statement. A. Yes, sir.

Q. Now wasn't that version you gave at that time your opinion of what happened out there on that occasion? A. Yes.

Mr. Morrison: I will ask that be introduced in evidence.

The Court: Admitted.

(The statement referred to was received in evidence as Defendants' Exhibit 1.)

DEFENDANTS' EXHIBIT No. 1

Nov. 3, 1955.

My name is Gary D. Moore, age 20. I live at Redmond, Ore., on Northwest Mkt. Rd. I am married, wife's name is Shirley Moore. We haven't any chil-

dren. I am employed by Deschutes Valley Potato Co., as a truck driver.

On Oct. 31, 1955, about 4:30 p.m., I was returning to Redmond, Ore., I was driving company truck 1950 International flat bed truck. I had a small load, 3 tons on truck.

I came up on an "S" curve on Hiwy. #26 about 7 miles from Gov't Camp, Ore. There was a vehicle on wrong side of road in the beginning of this "S" curve. I was chained up as Hiwy was rather slick with about 2 inch snow pack. It was cloudy and snowing lightly, I had my clearance lights on. I pulled to my extreme right against the snow bank and stopped about 40 to 50 feet to west of this stalled car. I saw on up ahead of me another car in my lane of traffic. This car was on to East a short distance from vehicle on wrong side of Hiwy. This was a Hudson vehicle; it was slipping and sliding as I stopped. As I got out of cab this Hudson slid into snow bank on right side of Hiwy and came to a stop. It's left wheels were about half way on the paved portion of Hiwy. It would have been necessary to go to left side of Hiwy to have passed this vehicle.

I saw that the car on wrong side of Hiwy was driven by a woman alone, it was a 1954 or '55 Chevrolet sedan. I didn't notice license number. I went over to ask if I could help her. She said yes. The driver and another man were starting to put chains on their car (Hudson) also at this time. About this time I saw approaching a yellow tank truck &

trailer coming up grade from the west. I could also see another tanker (red) coming down grade. Both of these tankers were traveling very slowly. These two tanks couldn't see each other due to curve, so I waved the Red Tanker down. I was standing to rear of the Chevrolet on north side of Hiwy. This Red tanker stopped at my signal some distance east of the Chevrolet, on its right side of road near snow (????). There was plenty of room between my truck and the Chevrolet for the yellow tanker to come on through so I waved this tanker on past. The yellow tanker passed the Chevrolet safely.

This rig was about 60 feet long and the truck was about even with the Hudson when trailer was about abreast of Chevrolet. This truck and trailer was having to travel to north of center of Hiwy to miss the Hudson in east lane of traffic. I couldn't see the two men at Hudson while this truck was passing. I don't know just how much clearance the truck had but it appeared to have enough or I wouldn't have waved the driver through. About the time the trailer was abreast of the Hudson I heard a bump and looked up to see what had happened. I saw the trailer straightening up from a slide to right (south) and a man straightening up from in back of Hudson at left rear wheel. He was holding his hip. About that time I saw the other man come out from under the right rear end of trailer. I ran up to scene of accident, the man was laying about on center line of Hiwy on his stomach. We didn't try to move him. The yellow truck came to a stop

within 40 feet. We covered the injured man and sent for help. The slightly injured man stood around for awhile. We helped shovel out his car and turn it around.

I don't believe that the Hudson was moved after accident until the driver was ready to follow ambulance back to Portland, Ore.

The driver of Chevrolet left after I had gone back and helped with her chains. She was a woman about 35 yrs. old. I believe with Oregon license.

I believe accident was caused by slick Hiwy, heavy super on curves and the fact that the tanker truck didn't have chains on. It looked like truck and trailer skidded to right (south) as it passed Hudson. If the truck could have been higher on super probably it wouldn't have skidded but the Chevrolet had the road blocked on that side.

The trailer slid about 3 to 5 feet to right. There were lots of arriving vehicle but I think at time of accident there was only myself, Chevrolet, Hudson and the two tank trucks. The Hudson was about as far to right as possible when the men started to put on their chains. They had slid to right and got out and started to put on their chains. The Hiwy is very wide at this point and had been plowed. It was just one of those unfortunate accidents where if the two men had just stepped out of the way the chances are that there would have been no damage.

I have read the above six page statement. It is true and correct to best of my memory.

/s/ GARY D. MOORE.

(Testimony of Gary Moore.)

Q. (By Mr. Morrison): Then you did tell him that you signaled him through, didn't you?

A. Yes.

Q. Has anybody threatened you with any lawsuit if you testified otherwise here? A. No.

Q. Are you sure about that? A. Yes.

Q. There was a lot of space between these two parked cars, wasn't there?

A. Quite a bit, yes. [26]

Q. And back of this guardrail, Gary, there is a wide space there, is there not, on the right-hand side of the highway, a wide shoulder there? I mean west of that turn.

A. On the right side of the road?

Q. On the right side of the road.

A. On the right side of the road it appeared to me——

Q. I am talking about going east.

A. Yes.

Q. Before you reach the curve? A. Yes.

Q. There is a wide shoulder there on the right side, is there not?

A. It didn't appear that way to me. It appeared that the pavement came close to the guardrail, very close.

Q. That what?

A. It appeared to me that the pavement came very close to the guardrail.

Q. You misunderstood me. I didn't make myself clear, Gary. The paved portion comes very close to the guardrail there, does it not? A. Yes.

(Testimony of Gary Moore.)

Q. Some eight inches, or something like that, from it? A. Yes, I would say.

Q. I didn't make myself clear on that. What I meant, Gary, was that going east before you come to that turn and before you [27] reach the guardrail there is quite a wide space on the right side, isn't there? A. Yes, there is.

Q. And then opposite to where this accident happened, where this truck that you stopped was, the tanker coming from the east, there is a wide shoulder over there to the left, isn't there?

A. Yes, it appeared to be.

Mr. Morrison: I think that is all.

Redirect Examination

By Mr. Lenske:

Q. Mr. Moore, were you asked by Mr. Spiegel to come here and testify for the plaintiff?

A. Yes.

Q. Were you paid anything by Mr. Spiegel or promised anything by Mr. Spiegel? A. No.

Q. Were you paid anything by anyone else?

A. I was given notice that I had reservations in a hotel and I was given \$25 as expense money.

Q. By whom?

A. By the lawyer in Roseburg.

Mr. Lenske: That is all.

Mr. Morrison: That is all.

(Witness excused.) [28]

Mr. Lenske: We will call Kenneth Buck as an adverse witness.

KENNETH BUCK

one of the defendants, was produced as a witness in behalf of plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lenske:

Q. What is your name, sir?

A. Kenneth Buck.

Q. Where do you live?

A. Madras, Oregon.

Q. How old are you? A. Thirty.

Q. By whom are you employed?

A. Kenneth Binder.

Q. In what capacity? What do you do for Mr. Binder? A. Truck driver and farm labor.

Q. How long have you been employed by Mr. Binder? A. Since June the 20th, 1954.

Q. On October 31, 1955, were you driving a truck and trailer for Mr. Binder? A. Yes, sir.

Q. Describe that truck and trailer, please.

A. It is a full truck and trailer, diesel, 60 feet long.

Q. By 60 feet long you mean the combination of the truck and the trailer?

A. Combination length, truck and trailer.

Q. What is the length of the truck and what is the length of the trailer?

A. The truck is 30 feet.

Q. And the trailer is another 30 feet; is that right? A. The trailer is 25.

(Testimony of Kenneth Buck.)

Q. Where is the other 5 feet? Is that in the tongue of the trailer? A. In the tongue, yes.

Q. Is the length of the tongue 5 feet?

A. Approximately.

Q. How is the trailer attached to the truck?

A. With the tongue.

Q. What kind of a hitch?

A. It is, oh, a logging hitch. It has two safety chains or safety cable.

Q. Is the tongue attached to the trailer—is the tongue of the trailer attached to the truck so that the trailer will be rigid and straight with the truck at all times? A. No.

Q. It is not? A. No.

Q. Is it attached so that the trailer will swing from side to side and not be rigidly straight with the truck? [30] A. That is right.

Q. How much of an arc will the rear end of the trailer make?

A. I couldn't say exactly, but it will turn quite sharp.

Q. It will turn quite sharply? A. Yes.

Q. Where there is a grade will the trailer be more apt to swing than if it is on level ground that you are driving at the time?

A. You mean going up a grade?

Q. No, where there is a super on the highway so that the road itself has a grade going from left to right.

A. It will track within six inches of the truck tracks.

(Testimony of Kenneth Buck.)

Q. Pardon?

A. It will track within six inches of the truck tracks. The trailer tracks will track within six inches of the truck tracks.

Q. The trailer tracks are normally within six inches of the truck tracks? A. On a curve, yes.

Q. On a curve? A. On a supered curve.

Q. When going straight ahead how much difference is there? A. It follows straight behind.

Q. The super normally makes only six inches difference?

A. The super doesn't have anything to do with it. The curve [31] does.

Q. The curve does? A. Yes.

Q. It will make a variation of six inches?

A. Approximately.

Q. On October 31, 1955, what happened to the trailer immediately before and at the time that it struck Mr. Smith and Mr. Howard?

A. When I slowed down to go between the cars I was going so slow that it slipped sideways on the slick snow.

Q. Was the road slick and slippery at that time?

A. Evidently.

Q. Did you know that it was?

A. I had no way of knowing how slick.

Q. Did you observe automobiles along the highway there, parked along the highway, or people near the highway? A. I did.

Q. What did you observe?

(Testimony of Kenneth Buck.)

A. Lots of cars and trucks stopped on the scene, and one car and a man by the road on the left-hand side. The rest were on the right off the road, clear off as far as they could get.

Q. How many vehicles did you see?

A. Well, there was three trucks and about three or four cars.

Q. All parked in that particular area at that particular time? A. Yes.

Q. Did you observe Mr. Smith? [32]

A. No.

Q. You didn't see Mr. Smith at all?

A. No, nor his car.

Q. Pardon? A. Nor his car.

Q. You didn't see either him or his automobile at the time that you passed him?

A. I was blinded by these other parked trucks and cars.

Q. I didn't hear you.

A. I was blinded by the other parked trucks and cars.

Q. How far behind his automobile was the nearest truck? A. 150 feet.

Q. During that 150 feet that you were driving you didn't see Mr. Smith?

A. I seen Mr. Smith about 100 feet from——

Q. Again, I didn't hear you.

A. As I got around this truck, why, then I seen Mr. Smith.

Q. As you came around the truck you did see Mr. Smith?

(Testimony of Kenneth Buck.)

A. Yes. There was another car in front of this truck.

Q. Approximately 100 feet away you saw him?

A. Yes.

Q. Where was he and what was he doing at that time?

A. He was kneeling down beside the truck or the car putting on chains, or what appeared to be putting on chains.

Q. Did you see Mr. Howard at that time? [33]

A. I seen two people, yes.

Q. Where was Mr. Howard?

A. He was just right by the wheel, too, just in front of Mr. Smith.

Q. What was he doing at that time?

A. Helping Mr. Smith—appeared to be putting on chains.

Q. Did you see anyone else in and about that area at that time? A. I did.

Q. Whom did you see?

A. I seen Gary Moore and this woman——

Q. Where was the lady?

A. Standing behind her car.

Q. Standing behind what?

A. Behind her car.

Q. Where was Gary Moore?

A. Standing back just a few feet from her.

Q. Now at that time you said you slowed down. When did you slow down?

A. When I first seen the cars and trucks.

Q. How much space was there between Mr.

(Testimony of Kenneth Buck.)

Smith and the closest object on the left-hand side of the road; that is, either a person or an automobile? A. About 15 feet.

Q. When you say about 15 feet you don't mean exactly 15 feet [34] do you?

A. I mean about 15 feet.

Q. It might have been 16 feet? A. Right.

Q. Might have been up to 20 feet?

A. Possibly.

Q. Now, did you have any cause to believe that your trailer would sway at that time and place as you went through that area?

A. I did not.

Q. What caused it to sway?

A. On the super, going too slow on the slick super.

Q. Because you were going too slow at that particular time? A. That is right.

Q. If you were going faster, would you have been able to avoid the swaying of the trailer?

A. I would have.

Q. Were you in a position to stop at that particular time? A. I was.

Q. Then you could have brought your truck and trailer to a stop before passing Mr. Smith at that time and place? A. Yes.

Mr. Lenske: That is all.

(Testimony of Kenneth Buck.)

Cross-Examination

By Mr. Morrison:

Q. Why didn't you stop? [35]

A. The road was too slick, and on that steep super I would have slid down the grade into all these cars.

Q. Into all those cars? A. Yes, sir.

Q. But I mean when you came up there at first were you planning to stop?

A. I had started to stop, yes.

Q. Then why didn't you stop?

A. Because Gary Moore waved me on.

Q. He waved you through? A. Yes.

Q. When you went by this other vehicle, or between those two vehicles, about how fast would you say you were going?

A. About 15 to 18 miles an hour.

Mr. Morrison: That is all, your Honor.

Redirect Examination

By Mr. Lenske:

Q. Mr. Buck, you say that you could have stopped, and you mentioned you could not have stopped without striking an automobile at that time.

A. I could have stopped, yes, but the truck after stopping would slide down the super.

Q. In other words, you couldn't have stopped without striking either an automobile or a person in the situation as it existed [36] at that time?

(Testimony of Kenneth Buck.)

A. That is right.

Q. When did you find out that that was the situation?

A. When I seen Mr. Howard's car and him and Smith, or Mr. Smith's car, whichever it was. When I seen them it was too late to try to stop for fear of sliding into somebody else.

Q. Was it the slippery condition of the road at that time that would have made it difficult for you to stop without hitting a truck or an automobile? A. Yes, sir.

Q. When did you first observe that slippery condition of the road?

A. When I seen cars sliding all over the road.

Q. How far back were you when you first saw that? A. About 300 feet.

Q. Could you have stopped at that time?

A. I could have.

Q. Without striking anything?

A. I could have.

Q. Or anybody? A. Yes.

Q. Did you have chains on at that time?

A. No.

Mr. Lenske: That is all. [37]

Recross-Examination

By Mr. Morrison:

Q. Had you up until the time of this accident slipped or lost traction at all? A. Never.

(Testimony of Kenneth Buck.)

Q. About how far back from there had it started to snow?

A. It was at Zigzag. That is about 36 miles, I believe.

Q. When you first came up onto this scene, seeing those trucks, you planned then to stop until you were waved through? A. I did.

Mr. Lenske: That is objected to as leading, your Honor.

The Court: This is Cross-examination.

A. I did.

Mr. Morrison: That is all.

Redirect Examination

By Mr. Lenske:

Q. Mr. Buck, you didn't observe the slippery condition of the road until you saw all those cars parked and the people in the road. Do I understand that to be your testimony?

A. That is right.

Q. Was the road as slippery immediately before that 300 feet as it was after that 300 feet?

A. I never tested it.

Q. You didn't intend to stop and put your chains on at that [38] time, did you?

A. Not until I felt that they was needed.

Q. You didn't feel that they were needed at that time? A. No.

Q. Did you have a load on your truck?

A. No, I was empty.

(Testimony of Kenneth Buck.)

Q. Was your trailer empty, too?

A. Yes.

Q. What is the weight of your truck and what is the weight of your trailer when empty?

A. The truck weighs about 17,000, and the trailer weighs about 10,000. Excuse me. The truck weighs 21,000.

Q. The truck weighed at that time 21,000 pounds?

A. Approximately, yes.

Q. And the trailer weighed how many thousand pounds?

A. About 10,000 pounds.

Q. Or a total of 31,000 pounds empty; is that right?

A. Yes.

Q. Now, will the trailer sway or slide more readily when it is empty or less readily when it is empty as against when it has a cargo?

A. It never sways except when there is something to cause it to sway.

Q. What caused it to sway in this instance?

A. It didn't sway. It slid. [39]

Q. What caused it to slide in this instance?

A. Gravity. It slide down the hill.

Q. How long a distance did it slide?

A. About five to six feet.

Q. A total of five to six feet at the outside or the inside?

A. It slid down the hill about five feet.

Q. At the widest part of the arc?

A. Yes.

Q. What part of your trailer slid first?

A. The front.

(Testimony of Kenneth Buck.)

Q. Then what happened?

A. Then when it straightened out the back end slid.

Q. Which part of the trailer struck Mr. Smith and Mr. Howard? A. The rear.

Q. Now, as I understand it, you say it slid on account of gravity?

A. It slid on account of it was on a hill and on the super.

Q. Because it was on the super?

A. It was slick, yes.

Q. Because of the grade going right to left?

A. That is right.

Q. On that particular highway at that time?

A. Yes.

Q. Now were you aware of such a grade before you tried to pass through? [40] A. Yes.

Mr. Lenske: That is all.

Mr. Morrison: That is all.

(Witness excused.)

(Thereupon, a recess was taken until 1:30 o'clock p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows:)

Mr. Lenske: If the Court please, we have two additional witnesses in our principal case. They are both doctors. We requested that they be here at 1:30, but we have been advised that they won't be able to get here until around 2:00 o'clock.

The Court: Do you expect to make a motion on liability?

Mr. Morrison: Yes, your Honor.

The Court: I will hear you now. You rest your case on liability?

Mr. Lenske: Yes.

Mr. Morrison: May it please the Court, at this time the defendant moves the Court for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right of relief. In support of this motion we contend that the plaintiff's testimony affirmatively shows that he was guilty of contributory negligence as a matter of law, first in placing himself in a position of peril and remaining there and, second, in failing [41] to keep a proper lookout. And on the third ground that he assumed the risk of the attending danger.

(The motion was argued to the Court by counsel.)

The Court: I don't see any negligence in the case. The motion to dismiss will be allowed on that ground.

Ladies and gentlemen you are now discharged from further consideration of the case.

(Whereupon, proceedings in the above cause were concluded.) [42]

Reporter's Certificate

I, John S. Beckwith, an Official Court Reporter of the above-entitled Court, hereby certify that I

reported in shorthand the testimony and proceedings had upon the trial of the above-entitled cause on May 22, 1956, before Honorable Claude McCulloch, Chief Judge; that thereafter I prepared a typewritten transcript from my shorthand notes, so taken, and the foregoing transcript, pages 1 to 42, both inclusive, constitutes a full, true and correct transcript of the testimony adduced upon the trial of said cause, and of the whole thereof.

Witness my hand this 20th day of July, 1956.

/s/ JOHN S. BECKWITH,
Official Court Reporter. [43]

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Jan. 11—Filed complaint.

Jan. 11—Issued summons—to marshal.

Feb. 15—Filed summons.

Feb. 17—Filed motion for order appointing E. E.

Dent to serve process in Jefferson County.

Feb. 17—Entered and filed order appointing E. E.

Dent to serve process in Jefferson County.

Feb. 17—Mailed summons to E. E. Dent, Madras,

Ore., for service.

Feb. 21—Filed summons with return.

Feb. 24—Filed answer.

Feb. 24—Filed demand of defendants for jury trial.

Feb. 28—Filed reply.

- Mar. 19—Entered order setting for pretrial conference on April 16, 1956.
- Apr. 16—Entered Order setting for trial on May 22nd, 1956.
- May 2—Filed depositions of Floyd Smith and Kenneth Buck.
- May 15—Issued 2 subpoenas—8 copies—to defendants' attorneys.
- May 22—Filed and entered Pretrial Order.
- May 22—Record of trial before jury.
- May 22—Motion of defendant for Order of Dismissal.
- May 22—Entered Order Allowing Dismissal.
- May 24—Filed and entered Order of Dismissal.
- May 31—Filed motion for new trial and to set aside judgment of dismissal.
- June 22—Entered Order setting Motion for New Trial for July 6th.
- Aug. 8—Entered Order Setting Motion for New Trial for August 13th.
- Aug. 13—Record of hearing on motion for new trial denied.
- Aug. 30—Filed and entered order denying motion for new trial.
- Sept. 11—Filed notice of appeal.
- Sept. 11—Filed designated of record on appeal.
- Sept. 12—Filed 2 copies transcript of proceedings
- Sept. 11—Filed 2 copies transcript of proceedings of May 22, 1956.
- Sept. 24—Filed and entered order to transmit exhibits to Circuit Court of Appeals.
- Sept. 24—Filed motion directing Clerk to transmit exhibits to Circuit Court of Appeals.

In the United States District Court
for the District of Oregon

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, R. DeMott, Cleark of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Answer, Pretrial order, Order of dismissal, Motion requesting order of dismissal be set aside and new trial ordered, Order denying motion, Notice of appeal, Undertaking on appeal, Designation of record on appeal, Order to forward exhibit to Court of Appeals and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8421 in which Floyd Smith is the plaintiff and appellant and Kenneth Buck and Kenneth Binder are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, May 22, 1956, and Exhibit No. 1.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 2nd day of October, 1956.

[Seal] R. DE MOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15323. United States Court of Appeals for the Ninth Circuit. Floyd Smith, Appellant, vs. Kenneth Buck and Kenneth Binder, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: October 3, 1956.

Docketed: October 10, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15323

FLOYD SMITH,

Plaintiff-Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,

Defendant-Respondent.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Comes now Appellant and makes his statement of the points upon which he intends to rely in the within-entitled appeal and his designation of record as follows:

Statement of Points

The Court erred in dismissing plaintiff's case in that there was sufficient evidence of defendants' negligence to require that said issue be submitted to the jury for the jury's determination.

Designation of Record

Appellant designates as material to the consideration of this appeal, the Pretrial Order entered in said cause and the entire transcript of the testimony and evidence adduced at said cause together with the exhibit introduced therein as documentary evidence.

/s/ DAVID M. SPIEGEL,

Of Attorneys for Plaintiff-
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed October 10, 1956.

